SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 300

HERBERT BROWNELL, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

vs.

SERGE RUBINSTEIN

ON WRIT OF CERITORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Joint Appendix

1 In United States District Court for the District of Columbia

SERGE RUBINSTEIN, 814 FIFTH AVE., NEW YORK CITY, PLAINTIFF

v.

JAMES P. MCGRANNERY, ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT

Complaint

(Filed December 30, 1952)

The plaintiff, Serge Rubinstein, respectfully alleges:

1. That this is an action for a declaratory judgment under the Declaratory Judgment Act (28 U. S. C. 2201) and for review under the Administrative Procedure Act (5 U. S. C. 1001, et seq.).

2. That the plaintiff, a native of Russia and now stateless, and his parents in 1918 fled from the country of his birth, Russia, to escape Communist persecution. That plaintiff arrived in the United States in 1935, was admitted for permanent residence on April 3, 1938, and has resided continuously in the United States since that time.

3. That the defendant is the Attorney General of the United States and is charged with the statutory duty to determine after appropriate hearings whether aliens are to be deported from the United States, and supervises the administration of the Immigration and Naturalization Service and the Board of Immigration Appeals.

4. That the plaintiff provides all the living expenses of his two minor citizen-children, ages six and seven, and also of his mother, a United States citizen over seventy years of age, who resides with him, and his aunt, a United States citizen who is also over seventy years of age.

5. That in April of 1939, the plaintiff took a Caribbean cruise for six to ten days on the S. S. *Kungsholm*, making a round trip from New York City.

6. That on April 23, 1947, plaintiff was convicted of violation of 50 App. U. S. C. 311 and sentenced to imprisonment for two and one-half years. United States v. Rubinstein, 166 F. (2d) 249.

7. That the plaintiff was thereafter served with a warrant of arrest in deportation proceedings issued by the District Director of the Immigration and Naturalization Service at Philadelphia.

8. That thereafter the plaintiff was accorded a deportation hearing on November 5, 1948.

9. That the Hearing Officer who presided at such first
2 hearing recommended that the warrant of arrest be cancelled and the proceeding terminated upon the ground that plaintiff's crime did not involve moral turpitude.

10. That the District Director at Philadelphia reviewed the aforesaid deportation order and although not authorized to do so, he filed a memorandum recommending deportation.

11. That thereafter without any request on the part of plaintiff, and contrary to his desires, the Commissioner of Immigration directed a hearing de novo.

12. That a rehearing was held on October 1, 1951.

13. That the rehearing was conducted by a presiding officer who was subject to the control and supervision of officials in the Immigration Service and in the Department of Justice who engaged in prosecuting and investigatory functions.

14. That the aforesaid presiding official was improperly influenced by the views of his superiors, including the District Director at Philadelphia, recommending deportation.

15. That the aforesaid hearing was required to be conducted under oath.

16. That the presiding officer administered a purported oath but was not authorized so to do by any federal or state law.

17. That the said rehearing was not authorized by law, was prejudicial to plaintiff, and was null and void.

18. That upon rehearing as aforesaid, the presiding officer recommended plaintiff's deportation upon the ground that his crime involved moral turpitude and was committed within five years after entry into the United States.

19. That upon appeal, the Board of Immigration Appeals ordered the plaintiff's deportation and referred the case to the Attorney General for review of the Board's decision. That the Attorney General affirmed the Board's decision.

20. That in reaching the conclusion to deport plaintiff, the defendant acting through his agents considered matters outside the record of hearing which was available to plaintiff and his counsel.

21. Upon information and belief, that defendant maintains a separate confidential file concerning plaintiff which is not available to plaintiff or his counsel.

3 22. Upon information and belief, that the defendant received many letters, telegrams and other communications urging plaintiff's deportation.

23. Upon information and belief, that defendant's attention was directed to newspaper columns urging plaintiff's deportation.

24. Upon information and belief, that defendant is in possession of confidential information relative to plaintiff which was not made available to plaintiff and his counsel.

25. Upon information and belief, that the deportation order herein was entered and plaintiff's case was considered by defendant and his subordinates in the light of unfavorable newspaper publicity and confidential information not disclosed to plaintiff.

26. That by reason of the foregoing, plaintiff was denied the rudimentary requirements of due process and elementary fairness, and the deportation hearing and order herein were null and void.

27. That plaintiff is not a citizen of any country and is now stateless.

28. That plaintiff has no residence or domicile in any country except the United States.

29. That plaintiff has no passport or other travel documents and has no right to enter any foreign country.

30. That the order of deportation herein does not specify the place to which the plaintiff is to be deported.

31. That the order of deportation entered herein is vague, and null and void.

32. That the defendant has not accorded plaintiff a hearing as to the place to which he is to be deported nor does he intend to grant him such hearing, although requested to so do.

33. That plaintiff has not been convicted of a crime involving moral turpitude.

34. That plaintiff is not subject to deportation.

35. That defendant is threatening to take plaintiff into custody for the purpose of deporting him and unless restrained will do so, causing plaintiff irreparable injury.

4 Wherefore, plaintiff prays for judgment declaring that

(a) The deportation hearing herein was unfair, null and void.

(b) The deportation order herein was null and void.

(c) That the plaintiff is not subject to deportation.

(d) Restraining the defendant from taking plaintiff into custody and deporting him.

(e) For such other and further relief as may be appropriate.

JACK WASSERMAN,
Attorney for Plaintiff,
Warner Building, Washington 4, D. C.

LEMUEL B. SCHOFIELD, Esq.,
EDWARD J. ENNIS, Esq.,
Of Counsel.

LEED THROUGH POOR COPY

In United States District Court

Motion for preliminary injunction

(Filed, December 30, 1952)

The plaintiff, by his attorneys, moves the court for an order granting a temporary restraining order and preliminary injunction against the defendant pending determination of this suit and until further order of the court upon the grounds and in accordance with the prayers set forth in the complaint and other papers filed herein.

JACK WASSERMAN,
Attorney for Plaintiff,
Warner Bldg., Washington 4, D. C.

LEMUEL B. SCHOFIELD, Esq.,
EDWARD J. ENNIS, Esq.,
Of Counsel.

5 In United States District Court

Affidavit

(Filed, December 30, 1952)

DISTRICT OF COLUMBIA,
City of Washington, ss:

Jack Wasserman, being duly sworn, deposes and says:

1. That he is one of plaintiff's attorneys in the above entitled action.

2. That as more fully appears from the complaint filed herein, the defendant has entered an order of deportation against plaintiff herein and is threatening to take him into custody for the purpose of deporting him.

3. That the defendant has been advised that plaintiff intends to seek judicial review of the order of deportation but has nevertheless advised plaintiff's attorneys that he plans to take plaintiff into custody.

4. That the plaintiff and his parents in 1918 fled from the country of his birth, Russia, to escape communist persecution. That plaintiff arrived in the United States in 1935 and has resided continuously in the United States since 1938—approximately 14 years. That he resides at 814 Fifth Avenue, New York, New York. That he provides all the living expenses for his citizen mother and citizen aunt, both over seventy, and his minor American-born children, age six and seven.

5. That defendant is seeking to deport plaintiff because of a violation of Section 11 of the Selective Service and Training Act of 1940 (50 U. S. C. Appendix 311) committed in 1943. Plaintiff can be deported only if the crime involved moral turpitude and if he has had a fair administrative hearing. Plaintiff believes that the crime did not involve moral turpitude and that he was not accorded a fair hearing for the reasons detailed in
6 his complaint and accordingly is seeking judicial review of these issues. That such judicial review is sought in good faith.

6. That if the defendant is not enjoined from proceeding under the order of deportation, plaintiff will be taken into custody and deprived of his liberty until such time as the proceeding has been determined.

7. That plaintiff will thereby be deprived of his ability to earn a living and support himself and his dependents and this court may be deprived of jurisdiction over the declaratory judgment action herein filed by plaintiff against defendant.

8. That plaintiff's removal from the United States will leave him without remedy.

9. That the plaintiff has resided in the United States for fourteen years and is being deported for a statutory offense committed some ten years ago. That he has been granted administrative bail during the entire administrative hearing herein. That the best interests of the United States will not be adversely affected by continuing to permit plaintiff to be at large. That there has been no suggestion by anyone that plaintiff is hostile in any manner to the Government of the United States or does not adhere to the principles of Democracy or has been engaged or is engaged or is likely to engage in any subversive activity or is engaged or is likely to engage in any criminal or reprehensible activities.

10. That in all similar cases, the defendant has authorized the continuation of bail for persons similarly situated during judicial review, and defendant's denial of the continuation of bail herein constitutes an abuse of discretion.

11. That as plaintiff has dependents as noted above, is gainfully employed and the president of several business corporations, his detention for any period will result in irreparable injury and damage to him and to the business interests of the corporations.
7 Wherefore he prays that a restraining order and a preliminary injunction issue enjoining the defendant from any action seeking to take him into custody or to remove him from the United States under the order of deportation herein.

(S) JACK WASSERMAN

[Jurat omitted in printing.]

In United States District Court

Proposed temporary restraining order and denial thereof

(Denied by Judge Pine, December 30, 1952, 4 p. m.)

Upon consideration of the application of the plaintiff for a restraining order pendente lite against the defendant, and it appearing to the court that the acts of the defendant threatening to take the plaintiff into custody and deporting him, and his refusal to permit plaintiff to be at large on bail pending judicial review, will subject the plaintiff to irreparable injury, and that the actions of the defendant should be immediately restrained, and there is no opportunity for delay to give a hearing to the defendant in advance of such restraining order without subjecting the plaintiff to irreparable injury and deprivation of his means of livelihood, It is, by this Court, this ------ day of December, 1952.

Adjudged and ordered, that the defendant, James P. McGranery, the Attorney General of the United States, and his subordinates, clerks and employees of every kind, be and they hereby are restrained and enjoined from taking any further steps with a view toward taking plaintiff into custody and/or deporting him until further order to be entered herein; Provided an injunctive undertaking in the sum of $250 be given and approved by the Court, and conditioned to pay such costs and damages as may be incurred or suffered by any party to this action who may be found to have been wrongfully restrained thereby, and provided further that this order shall expire on the ------ day of ----------, 195---- unless within said time it shall be extended for good cause shown for a like period, And it is further

8 Ordered and adjudged that the matter of the issuance of a preliminary injunction herein be set for hearing before the Motions Judge of this Court on the ------ day of ----------, 195---- at 10:00 o'clock in the forenoon, provided a copy of this order is served on defendant, James P. McGranery, on or before the ------ day of ----------, 195----

———— ————,
United States District Judge.

Signed on ----------, 195---- ------- M.

Undertaking for $250 approved and filed December ------, 1952.

———— ————,
Clerk.

By ———— ————,
Deputy Clerk.

Denied 4 p. m., December 30, 1952.

DAVID A. PINE,
U.S.D.J.

In United States Court of Appeals for the District of Columbia Circuit

January Term, 1953

No. 11665

Before EDGERTON, BAZELON *and* FAHY, Circuit Judges, in Chambers

Order

(Filed, January 5, 1953)

The Supreme Court having decided in Kristenson v. McGrath, 340 U. S. 16 (1950), that an action for declaratory judgment lies to test the validity of a final order of deportation, and it appearing to follow that the validity of an order of detention incidental to an order of deportation may be similarly tested;

It is ordered by the Court that this case be, and it is
9 hereby, remanded to the District Court for consideration of the question of detention in accordance with the principles applicable in habeas corpus proceedings, together with such other questions as may be before the Court; and

It is further ordered by the Court that the restraining order of this Court heretofore entered herein be, and it is hereby, continued in effect until further order of the District Court, and that the mandate issue forthwith.

Dated January 5, 1953.

PER CURIAM.

In United States District Court

Opinion

(Filed, January 23, 1953)

The plaintiff, Serge Rubenstein, an alien of Russian birth arrived in the United States in 1935 and was admitted for permanent residence on April 3, 1938. On April 23, 1947 plaintiff was convicted of violation of 50 U. S. C. app. § 311 and was sentenced to imprisonment for two and a half years. United States v. Rubenstein, et al. 166 F (2d.) 249. The indictment upon which plaintiff was found guilty charged him with the filing of false affidavits and conspiracy to file false affidavits for the purpose of evading the draft. Following certain administrative proceedings the Board of Immigration Appeals ordered plaintiff's deportation

and referred the case to the Attorney General for review of the Board's decision. The Attorney General affirmed the Board's decision. The deportation was ordered upon the ground that the crime for which plaintiff had been convicted involved moral turpitude and was committed within five years after plaintiff's entry into the United States.

By the complaint filed herein plaintiff asks a judgment declaring the deportation order null and void; that he is not subject to deportation; that the deportation hearing was unfair and that defendant be enjoined from taking plaintiff into custody and deporting him. On December 30, 1952 Judge Pine of this court denied plaintiff's request for a temporary restraining order expressing his belief that after arrest habeas corpus proceedings would afford plaintiff an adequate remedy. An appeal was taken from Judge Pine's order. The Court of Appeals for this
10 circuit heard counsel for defendant concede that plaintiff's detention was not required for public security reasons and on December 31, 1952, entered an order restraining the defendant from revoking plaintiff's bail and from taking him into custody and providing that such stay would expire at eleven o'clock a. m. on January 5, 1953, unless extended by further order of that court and on January 2, 1953, entered the following order:

"The Supreme Court having decided in Kristensen v. McGrath, 340 U. S. 162 (1950), that an action for declaratory judgment lies to test the validity of a final order of deportation, and it appearing to follow that the validity of an order of detention incidental to an order of deportation may be similarly tested;

"It is ordered by the Court that this case be, and it is hereby, remanded to the District Court for consideration of the question of detention in accordance with the principles applicable in habeas corpus proceedings, together with such other questions as may be before the Court; and

"It is further ordered by the Court that the restraining order of this court heretofore entered herein be, and it is hereby, continued in effect until further order of the District Court, and that the mandate issue forthwith."

In view of the expression of the Supreme Court in Kristensen v. McGrath referred to in the order of the Court of Appeals which has been quoted it is not doubted that the plaintiff may test the legality of the order of deportation as he does in this action in a suit for a declaratory judgment. It clearly appears that plaintiff who is not in custody may seek his remedy in this action and is not required as his only remedy to proceed through the writ of habeas corpus when and if he be arrested and detained.

The matter presently before the court is whether, pending final decision in his action for declaratory judgment, plaintiff has made

a sufficient showing to justify the court in granting a preliminary injunction restraining the defendant from arresting the
11 plaintiff and taking him into custody. It will be noted that the complaint is not under oath but is signed simply by an attorney for plaintiff. Plaintiff's motion for preliminary injunction is supported by the affidavit of the attorney who signed the complaint. An examination of such affidavit indicates that in large part it is not made upon personal knowledge but is in substance and effect a restatement of matters set out in the complaint. While plaintiff contends that the hearing which resulted in the order of deportation lacks due process no factual basis is shown which supports such contention. It appears that the only ground for his motion with substance is his view that the crime of which he was convicted did not involve moral turpitude.

Moral turpitude has been variously defined by the courts. Perhaps the definition more commonly accepted is that it describes an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man. The courts have generally included crimes malum in se conspiracy, embezzlement, extortion, fraud, interference with military forces, larceny, libel and slander, perjury, receiving stolen property, receiving reward under color of office, robbery, swindling, use of mails to defraud, violation of espionage laws, violation of narcotics act, violation of prohibition law.

It has been defined to mean anything done contrary to justice, modesty, or good morals. It has been said that if one conspires against the public interest by agreeing to violate the law or some rule of public policy, the act involves moral turpitude. It has been said that the use of the word moral proceeding the word turpitude adds little meaning since turpitude means anything done contrary to justice, honesty, modesty or good morals. Courts have held that moral turpitude as used in criminal statutes is not limited in its meaning to offenses which are malum in se and may include those which are merely malum prohibitum, as the concept of moral turpitude depends upon the state of public morals, varying according to the times, as it involves violation of a rule
12 of public policy and morals. Many courts have held that crimes involving fraud are crimes which involve moral turpitude and this relates to statutes authorizing deportation of aliens who are charged with the commission of crimes described in statutes as involving moral turpitude. Likewise it has been said that conspiring to defraud a person by deceit involves moral turpitude within a statute authorizing deportation of aliens convicted of crimes involving moral turpitude. Where an alien was convicted of having concealed assets from the Trustees in Bank-

ruptcy the crime was defined to be one involving moral turpitude within the meaning of the Immigration Act 1917, Section 19, for which he could be deported. An alien convicted of making false statements regarding another alien's name and entry into the United States held convicted of crime involving moral turpitude within deportation act, 8 U. S. C. A. Sections 155, 414.

Jordan, District Director of Immigration and Naturalization v. De George, 341 U. S. 223 involved a deportation proceeding in which De George was being deported on the basis of his conviction of a crime involving moral turpitude. The crime charged was a conspiracy to defraud the United States of taxes on distilled spirits. It was held that the crime involved moral turpitude within the meaning of the Immigration Act of 1917, 8 U. S. C. Section 155 (a). The Supreme Court stated "Fraud is the touch stone by which this case should be charged. The phrase 'crime involving moral turpitude' has without exception been construed to embrace fraudulent conduct."

It is well settled in the law that before a court will issue a preliminary injunction the movant must establish with reasonable certainty that he will be successful in the ultimate action. This principle is well stated in Hall Signal Co. v. General Ry. Signal Co., 153 Fed. 907. In that case the court stated the requirement in this manner; "It is a cardinal principle of equity jurisprudence that a preliminary injunction shall not issue in a doubtful case. Unless the court be convinced with reasonable certainty that the complainant must succeed at final hearing the writ should be denied." The doctrines of that case has been consistently fol-
13 lowed by the courts. See St. Louis Street Mach. Co. v. Sanitary Street Flushing Mach. Co., 161 Fed. 753; Atlantic & Gulf West Coast v. United States, 90 F. Supp. 554; Swack v. Kraus Bros. & Co., 97 F. Supp. 719; United States v. Libby, McNeil & Libby, 98 F. Supp. 601.

Considering the facts which are well pleaded and the principles of law involved it results that the plaintiff has failed to make a sufficient showing to justify the issuance of a preliminary injunction.

Plaintiff's motion for preliminary injunction will be denied. Counsel for defendant will present an appropriate order.

F. DICKINSON LETTS,
Judge.

In United States District Court

Order denying motion for preliminary injunction

(Filed January 23, 1953)

Upon consideration of the pleadings and the memorandum filed herein, and it appearing to the Court that plaintiff has not made

a sufficient showing to justify the issuance of a preliminary injunction, it is, this 23 day of January, 1953,

Ordered that the motion for preliminary injunction be, and it is hereby, denied.

F. DICKINSON LETTS,
Judge.

[Certificate of service omitted in printing.]

In United States District Court

Notice of appeal

(Filed January 24, 1953)

Notice is hereby given that plaintiff hereby appeals from the denial of the motion by plaintiff for a preliminary injunction herein and the failure of the District Court to
14 comply with the mandate of the Court of Appeals herein to determine the question of plaintiff's detention in accordance with applicable rules of habeas corpus.

JACK WASSERMAN,
Attorney for Plaintiff,
Warner Building, Washington 4, D. C.

Dated January 23, 1953.

In United States District Court

Stipulation designating record

(Filed January 27, 1953)

It is hereby stipulated by and between the attorneys for the respective parties herein that the record on appeal consist of the following:

1. Complaint.
2. Motion for Preliminary Injunction.
3. Application for Restraining Order.
4. Order denying Restraining Order.
5. Mandate of Court of Appeals.
6. Opinion of Judge Letts filed January 23, 1953, Denying Motion for Prelim'nary Injunction.
7. Order Denying Preliminary Injunction.
8. Notice of Appeal filed January 24, 1953.
9. Stipulation Designating Record.

In United States Circuit Court for the District of Columbia Circuit

No. 11683

Motion for restraining order

(Filed January 24, 1953)

Comes now the appellant and respectfully moves the Court for an order restraining the appellee and his successor, Hon. Herbert Brownell, Attorney General, from apprehending and detaining appellant pending appeal and decision of this Court from a denial filed January 23, 1953, of appellant's motion for a preliminary injunction.

1. On January 23, 1953, the District Court signed and filed an order herein denying appellant's motion for a preliminary injunction herein. As of 9 a. m., January 24, 1953, appellant's counsel has not seen or received a copy of said order, although the first mail of the day has been delivered to his office.

2. Appellee's successor, Herbert Brownell, as Attorney General is seeking to apprehend and detain appellant pursuant to a warrant of deportation which designates no country to which appellant shall be deported and without affording him a hearing upon the issue of physical persecution. On the night of January 23, 1953, agents of appellee's successor were outside appellant's home in New York ready to apprehend him.

3. On January 23, 1953, Judge F. Dickinson Letts, denied appellant's request for a stay pending appeal.

4. Notice of Appeal will be filed on January 24, 1953, and counsel will requisition the District Court file containing the order and opinion herein of Judge Letts together with the additional memoranda of law which were submitted to the Court below.

5. Appellant submits that the Court below did not comply with the mandate of this Court and determine the question of appellant's detention in accordance with applicable rules of habeas corpus and that it has not correctly ruled upon the motion for a preliminary injunction.

6. Appellant further submits that as a matter of discretion, this Court should grant a restraining order pending decision of the appeal which is being filed today.

Respectfully submitted.

JACK WASSERMAN,
Attorney for Appellant,
Warner Bldg., Washington 4, D. C.

16 In United States Court of Appeals for the District of Columbia Circuit

January Term, 1953

No. 11683

Before EDGERTON, BAZELON and FAHY, Circuit Judges, in Chambers

*Per curiam order granting motion for restraining order**

(Filed January 26, 1953)

This cause came on to be heard on appellant's motion for an order restraining the appellee from apprehending and detaining the appellant pending appeal from an order of the District Court entered January 23, 1953, which order denied appellant's motion for a preliminary injunction restraining the appellee from apprehending and detaining appellant pending determination of this suit.

It appears that

(1) By order of this court entered January 5, 1953, on appeal from denial of a temporary restraining order, this case was remanded to the District Court for consideration of the question of appellant's threatened and imminent detention, in accordance with the principles applicable in habeas corpus proceedings, together with such other questions as were before the court.

(2) Upon remand the District Court entered an order denying a preliminary injunction, in reliance on its opinion that the order of deportation under review was valid because a crime of which appellant had previously been convicted involved moral turpitude.

(3) Another question for consideration in a habeas corpus proceeding and therefore in this declaratory judgment suit (McGrath v. Kristensen, 340 U. S. 162) is whether Sections 242 (a) and 242 (c) of the Immigration and Nationality Act of 1952, Public Law 414, 82d Cong., 2d Sess., 66 Stat. 163 et seq., authorize or forbid the arrest and detention of appellant in the present circumstances. Without assessing any other pertinent
17 question, we think this a substantial one which must be determined on this appeal. Under Section 242 (a) the appellee may take an alien into custody pending administrative determination of deportability as provided in Section 242 (b), and may continue that custody "pending such final determination

*As amended by the Court's order of January 27, 1953.

of deportability." The only other authority for detention is Section 242 (c), which authorizes appellee to take an alien into custody during a specified period for the purpose of effecting departure. This section may be read as meaning that the period does not commence until after "a final order of deportation under administrative processes * * * or, if judicial review is had, then from the date of the final order of the court". Since the appellant was not in custody during the period of administrative determination, now completed, since the administrative order is now under judicial review, and since departure cannot be compelled pending judicial review, a substantial question arises whether the Attorney General may, absent the sort of security purpose contemplated by the Act, take appellant into custody before "the date of the final order of the court" upon judic'al review.

(4) As we noted in our order of December 31, 1952, counsel for the appellee have stated to the court that no injury to the public interest is to be anticipated from postponing the appellant's arrest.

It is therefore ordered by the court that the appellee be and he is hereby restrained until further order of this court from revoking the appellant's bail and from taking him into custody on a warrant of arrest for deportation; and

It is further ordered that the brief for the appellant on this appeal be filed on or before February 9, 1953, and the brief for the appellee on or before February 23, 1953, and that this appeal be set for argument February 27, 1953.

Dated January 26, 1953.

PER CURIAM.

Fahy, Circuit Judge, dissenting

Pending the appeal from the denial by the District Court of a preliminary injunction which was there sought
18 to restrain the Attorney General, appellee, from apprehending and detaining appellant, we are asked so to restrain the appellee, it being conceded that no injury to the public interest from a security standpoint is involved.

As I read the statute, Publlic Law 414, 82nd Cong., 2d Sess., 66 Stat. 163 et seq., particularly § 242(c), the Attorney General is authorized at this point in the deportation proceedings, which have progressed to a final administrative order of deportation, to detain appellant, release him on bond in an amount and containing such conditions as the Attorney General may prescribe, or release him on such other conditions as the Attorney General may prescribe. The warrant of deportation under which appellee now seeks to apprehend and detain appellant does not exhaust the

discretion reposed by these provisions in the appellee; and if after apprehension that discretion should be illegally exercised, or if appellant should otherwise be illegally detained, relief by writ of habeas corpus would be available to appellant. In these circumstances I would not now intervene by our injunctive process to restrain the Attorney General. Although McGrath v. Kristensen, 340 U. S. 162 (1950), holds that the declaratory judgment procedure, which appellant is pursuing, is available to test the legality of a deportation order, it does not follow that the equitable powers of this court need be exercised to restrain steps which at present, as they seem to me, accord with the statutory plan in deportation cases.

280605—53—— 2

United States Court of Appeals for the District of Columbia Circuit.

Filed June 11, 1953, Joseph W. Stewart, *Clerk.*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11683

SERGE RUBINSTEIN, APPELLANT

v.

HERBERT BROWNELL, Attorney General of the United States, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided June 11, 1953

Mr. Edward J. Ennis, with whom *Mr. Jack Wasserman* was on the brief, for appellant.

Mr. Frank H. Strickler, Assistant United States Attorney, with whom *Messrs. Charles M. Irelan,* United States Attorney at time of argument, *William R. Glendon,* Assistant United States Attorney at time of argument, and *Robert M. Scott,* Assistant United States Attorney, were on the brief, for appellee. *Mr. Leo A. Rover,* United States Attorney, also entered an appearance for appellee.

Before EDGERTON, PROCTOR and BAZELON, Circuit Judges.

EDGERTON, *Circuit Judge:* On December 29, 1952, the then Attorney General issued an order for appellant Rubinstein's deportation. On the same day the Attorney General's subordinate the District Director of the Immigration and Naturalization Service ordered appellant's arrest. On December 30, 1952, appellant brought this suit against the then Attorney General for declaratory and injunctive relief. The present Attorney General has been substituted as appellee.

We are now reviewing the deportation order. We are reviewing only the District Court's denial of a temporary injunction to restrain the appellee from arresting the appellant.

Appellant is an alien whose deportation is sought because he was convicted[1] of filing and conspiring to file false affidavits in an attempt to evade the draft. He served his sentence of two years and six months for this crime. His complaint contends that the crime did not involve moral turpitude and therefore did not make him deportable,[2] and also that the deportation order is invalid for other reasons including lack of due process in the administrative proceedings. It asserts among other things that "defendant is threatening to take plaintiff into custody for the purpose of deporting him and unless restrained will do so, causing plaintiff irreparable injury." With the complaint appellant filed a motion for a temporary restraining order and a preliminary injunction. His counsel filed an affidavit that unless appellee is enjoined appellant will be deprived of liberty until the suit is over; that appellant was allowed bail during the entire administrative proceeding; that the interests of the United States will not be adversely affected by his continued liberty; and that no one has suggested that appellant is hostile to the government or likely to engage in subversive, criminal or reprehensible activities. Appellee has not denied any of these allegations.[3]

The District Court declined to issue a restraining order and Rubinstein appealed. On January 5, 1953, we remanded the case to the District Court "for consideration of the question of detention in accordance with principles applicable in habeas corpus proceedings, together with such other questions as may be before the Court." On January 23, 1953, the District Court denied a preliminary injunction. This court entered a temporary restraining order pending this appeal from that denial.

I.

We adhere to our ruling of January 5 that the legality of appellant's threatened and imminent detention may be tested in this suit by the principles that would be applicable in habeas corpus.

Heikkila v. *Barber*, 345 U.S. 229, decided March 16, 1953, is not to the contrary. Distinguishing *McGrath* v. *Kristensen*, 340 U.S. 162, and overruling decisions of this and two other Courts of Appeals,[4] the Supreme Court held that Heikkila could attack a deportation order only in habeas corpus because § 19 of the 1917

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[1] *United States* v. *Rubinstein*, 166 F. 2d 249 (2d Cir. 1948), *cert. denied*, 333 U.S. 868.

[2] Deportation was sought under § 19(a) of the Immigration Act of 1917, 39 Stat. 889, as amended, 54 Stat. 1238, 8 U.S.C. § 155(a). The parallel provision of the 1952 Act is § 241(a), 66 Stat. 204, 8 U.S.C.A. § 1251(a)(4).

[3] Appellee's counsel say in their brief that appellee has not yet determined whether to hold appellant in custody.

[4] Note 10, *infra*.

Immigration Act, 39 Stat. 890, under which the order was issued, "clearly had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution." 345 U. S. at 234-235. The Court pointed out that it did "not consider the 1952 Act, 66 Stat. 163, which took effect after Heikkila's complaint was filed." (n. 4) The 1952 Act, which is the Immigration and Nationality Act, 66 Stat. 163, 8 U.S.C.A. § 1101 *et seq.*, took effect December 24, 1952,[5] before Rubinstein's complaint was filed and even before the order for his deportation was issued. All agree that the 1952 Act and not the 1917 Act governs this suit.

The 1952 Act and its historical background. Unlike the 1917 Act, § 242(b)(4) of the 1952 Act provides that "no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence." Unlike the 1917 Act, §§ 242(c) and 242(e) of the 1952 Act expressly recognize that there may be "judicial review" of a final order of deportation. Section 242(c) provides that "the Attorney General shall have a period of six months from the date of such order, *or, if judicial review is had, then from the date of the final order of the court,* within which to effect the alien's departure from the United States . . ."[6]

"Judicial review" is not synonymous with habeas corpus[7] Nothing in § 242(e) restricts it to habeas corpus.

Section 242(b)(4) of the 1952 Act provides, in practically the same words as § 19(a) of the 1917 Act[8] which the Supreme Court construed in *Heikkila*, that "In any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General shall be final" But as the Supreme Court said in *Heikkila*, "That the Attorney General's decisions are 'final' does not settle the question . . . Read alone, [the term] might refer to the doctrine requiring exhaustion of administrative remedies before judicial process can be invoked." (p. 233) The Court had repeatedly held, before 1917, that in immigration legislation the word "final" was "intended to make these administrative decisions nonreviewable to the fullest extent possible under the Constitution." In *Heikkila* the Court held, "against this background of a quarter of a century of consistent judicial interpretation" before 1917, that § 19 of the 1917 Immigration Act "clearly had

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[5] § 407, 66 Stat. 281.

[6] Emphasis added.

[7] The Supreme Court said in the *Heikkila* case: "it is the scope of inquiry on habeas corpus that differentiates use of the writ from judicial review as that term is used in the Administrative Procedure Act." 345 U.S. at 236.

[8] 39 Stat. 890, as amended, 54 Stat. 1238, 8 U.S.C. § 155(a).

the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution" (pp. 234, 235);[9] that is to say, except in habeas corpus.

The 1952 Act has a very different background of judicial interpretation. In 1948, 1949, and 1950, three Courts of Appeals including this one ruled[10] that despite previous legislation making the Attorney General's deportation orders "final", they were subject to review under § 10 of the Administrative Procedure Act which Congress passed in 1946.[11] Throughout the time when Congress was considering and adopting the 1952 Act which we are construing, this was the unanimous view of the Courts of Appeals.

In dealing with other sorts of legislation, the Supreme Court had repeatedly held that the word "final" does not necessarily exclude, or limit to habeas corpus, judicial review of administrative action. *Estep* v. *United States*, 327 U.S. 114 (1946), is an example. Accordingly it had become common before 1952 for Congress, when it wished to preclude or restrict judicial review, to do so by express language and not to rely on the word "final". Section 601(e) of the Revenue Act of 1936, 49 Stat. 1740, provided that "The determination of the Commissioner of Internal Revenue with respect to any refund under this section shall be final and no court shall have jurisdiction to review such determination." A 1940 amendment of the World War Veterans Act of 1924, 54 Stat. 1197, 38 U.S.C. § 11a-2, provided that "the decisions of the Administrator of Veterans' Affairs on any question of law or fact concerning a claim for benefits . . . shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision."[12] A 1941 Excess Profits Tax amendment, 55 Stat. 26, provided that certain determinations of liability by the Board of Tax Appeals (now the Tax Court of the United States) "shall not be reviewed or redetermined by any court or agency except the Board."

Section 360(c) of the 1952 Act itself provides, as to persons *seeking admission* to the United States, that "A final determina-

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[9] The Court added "the decisions have continued to regard this point as settled." (p. 235) But all citations except "Sunal v. Large, 332 U.S. 174, 177, n. 3 (1947)", date from before the passage of the Administrative Procedure Act in 1946. The cited *Sunal* footnote reads: "We therefore lay to one side cases such as *Bridges* v. *Wixon*, 326 U.S. 135, *Duncan* v. *Kahanamoku*, 327 U.S. 304, and *Eagles* v. *United States ex rel. Samuels*, 329 U.S. 304, where the order of the agency under which petitioner was detained was not subject to judicial review."

[10] *United States ex rel. Trinler* v. *Carusi*, 166 F. 2d 457 (3rd Cir. 1948); *Podovinnikoff* v. *Miller*, 179 F. 2d 937 (3rd Cir. 1950); *Kristensen* v. *McGrath*, 86 U.S. App. D.C. 48, 179 F. 2d 796 (1949), *affirmed* in *McGrath* v. *Kristensen*, 340 U.S. 162 (1950); *Prince* v. *Commissioner*, 185 F. 2d 578 (6th Cir. 1950).

[11] 60 Stat. 237, 5 U.S.C. § 1001 *et seq.*

[12] *Van Horne* v. *Hines*, 74 U.S. App. D.C. 214, 122 F. 2d 207.

tion by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction *in habeas corpus proceedings and not otherwise*".[13] The fact that Congress said clearly what it meant in § 360(c) with regard to admission is strong evidence that it did not mean what it did not say in § 242(c) with regard to deportation.[14]

Legislative history of the 1952 Act. While the Act and its predecessor bills were pending, Congress considered and rejected proposals that would have had the effect of exempting deportation proceedings under the Act from review under § 10 of the Administrative Procedure Act.

In the 81st Congress, Senator McCarran introduced on April 20, 1950, a bill to revise the immigration and nationality laws. (S. 3455, 81st Cong., 2d Sess.) It provided in § 106 that "Notwithstanding the provisions of any other law—(a) determinations of fact by administrative officers under the provisions of this Act or regulations issued thereunder shall not be subject to review by any court; (b) determinations of law by administrative officers under the provisions of this Act or regulations issued thereunder shall not be subject to review by any court except through the writ of habeas corpus; and (c) the exercise of discretionary authority conferred upon administrative officers by this Act or regulations issued thereunder shall not be subject to review by any court."

In the 1st Session of the 82d Congress, a revised bill introduced by Senator McCarran (S. 716) and a bill introduced by Congress-

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[13] Emphasis added.

[14] Section 242(c) provides that "Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General *concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings* that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period." (Emphasis added.)

As the Second Circuit has held regarding practically the same language in § 242(a), this sentence "provides but an added statutory recognition of a basis for judicial review, not a limitation upon the power . . ." *United States ex rel. Yaris* v. *Esperdy*, 202 F. 2d 109, 112. (1) Read literally the sentence grants, and does not withdraw or restrict, authority to review. (2) It does not touch the subject of review, in habeas corpus or otherwise, of deportation orders, but relates only to review of "detention, release on bond, or other release" when the Attorney General is not proceeding with "reasonable dispatch" to effect a deportation. (3) The six-month period referred to, during which this sentence authorizes review of these matters, begins to run only after "a final order of deportation . . . or, if judicial review is had, then from the date of the final order of the court . . ." (4) So far if at all as the sentence in question may *imply* that the matters to which it refers, during the time to which it refers, may be reviewed only in habeas corpus, it implies that review of other matters and review at other times are not so limited.

man Walter (H.R. 2379) contained similar provisions, but a bill introduced by Congressman Celler (H.R. 2816) did not. There were joint hearings on these three bills. Representatives of the American Bar Association and many other organizations opposed restriction of judicial review and urged continued application of § 10 of the Administrative Procedure Act.[15] After these hearings a revised bill, S. 2055, introduced by Senator McCarran in the 1st Session of the 82d Congress; H. R. 5678, introduced by Congressman Walter in the 2d Session of the 82d Congress; and a revised bill, S. 2550, introduced by Senator McCarran in the 2d Session of the 82d Congress, all omitted the provisions of § 106 of the previous bills. The Immigration and Nationality Act as adopted omits them.[16]

During the House debate on April 24, 1952, Congressman Meader proposed to amend the bill by providing expressly that "the order of deportation shall be subject to review by any court of competent jurisdiction". (98 Cong. Rec. p. 4415) Congressman Walter, co-author of the bill, in opposing the amendment said (p. 4416): "Now, we come to this question of the finality of the decision of the Atorney General. That language means that it is a final decision as far as the administrative branch of the Government is concerned, but it is not final in that it is not the last remedy that the alien has. Section 10 of the Administrative Procedure Act is applicable. From that decision an appeal lies in the courts. . . . In view of the fact that every person who is ordered deported has all of these administrative processes available, plus an appeal to the court, plus the right to a writ of habeas corpus, I cannot conceive of a case where any injustice would be done by some capricious or arbitrary administrator." The Meader amendment was defeated.

In the Senate debate Senator McCarran said on May 22, 1952 (98 Cong. Rec. p. 5778): "The Administrative Procedure Act is made applicable to the bill. The Administrative Procedure Act prevails now."

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[15] *Joint Hearings before the Subcommittees of the Committees on the Judiciary* on S. 716, H. R. 2379, H. R. 2816, 82d Cong., 1st Sess., pp. 144, 446, 536-7, 590-1, 617-18, 699, 735.

[16] The Senate Judiciary Committee's Report No. 1137, 82d Cong., 2d Sess., January 29, 1952, on S. 2550, said the omission of the provisions of the former bills restricting review to habeas corpus was (p. 28) "not intended to grant any review of determinations made by consular officers, nor to expand judicial review in immigration cases beyond that under existing law." "Existing law" at that date included the Administrative Procedure Act as it had been interpreted in 1948, 1949, and 1950 by the *Trinler, Kristensen* and *Prince* decisions, *supra*, note 10. It did not include the *Heikkila* case (1953) which overruled those decisions.

II.

In our opinion the appellant if he were under arrest, would be entitled to release in habeas corpus

To justify the proposed arrest the appellee relies on § 242(c) of the 1952 Act. We think it inapplicable. The six month period during which § 242(c) gives the Attorney General discretion to detain an alien who has been ordered deported begins to run "if judicial review is had, then from the date of the final order of the court". There has not yet been a final order of the court. The purpose of the detention authorized by § 242(c) is "to effect the alien's departure from the United States". All agree that departure cannot be effected while the deportation order is under review.

The appellee does not rely on § 242(a), which relates primarily to the period before a final administrative deportation order is issued. Read literally, it may relate only to that period. But Congress can hardly have meant to give the Attorney General no authority to arrest the alien, in any circumstances, during the present interval between the final administrative deportation order and the final order of the court. To avoid such a gap in the statute we read the arrest provisions of § 242(a) as applicable during this interval.

Section 242(a) authorizes the Attorney General to keep an alien in custody, release him on bond, or release him on conditional parole. The Attorney General arrested the appellant and released him on bond. It also authorizes the Attorney General "in his discretion" to revoke the bond or parole and take the alien into custody again. But discretion in this connection is a reasonable discretion, not an arbitrary and capricious one. *Carlson* v. *Landon*, 342 U.S. 524, was a habeas corpus case decided under a provision of the Internal Security Act of 1950, 64 Stat. 1010, 8 U.S.C. (Supp. V) § 156(a), which likewise authorized the Attorney General in his "discretion" to keep an alien in custody pending final determination of his deportability. The Court said: "Respondent filed returns defending his orders of detention on the ground that there was reasonable cause to believe that petitioners' release would be prejudicial to the public interest and would endanger the welfare and safety of the United States. . . . The Government does not urge that the Attorney General's discretion is not subject to any judicial review, but merely that his discretion can be overturned only on a showing of clear abuse. . . . When in the judgment of the Attorney General an alien Communist may so conduct himself pending deportation hearings as to aid in carrying out the objectives of the world communist movement, that alien may be detained. . . . This is a permissible delegation of

legislative power because the executive judgment is limited by adequate standards." 342 U.S. at 529, 540, 544. *United States ex rel. Yaris* v. *Esperdy, supra,* note 14, was a habeas corpus case under the Immigration and Nationality Act of 1952. The Second Circuit said: "When there has been a revocation and a rearrest on the warrant, the test on habeas corpus of the lawfulness of the resulting detention is whether under the prevailing circumstances the Attorney General exercised a sound discretion". The court ruled, rightly we think, that "an allegation in the return that the appellant was engaged in communist activities up to the time of his rearrest sufficiently refutes the claim that there was an abuse of discretion by the Attorney General in revoking his bail and taking him into custody". 202 F. 2d at p. 111.

The *Carlson* case governs this one. The assertions in his counsel's affidavit that appellant is not hostile to the Government or likely to engage in subversive, criminal, or reprehensible activities are undenied. As we noted in our order of January 26, 1953, appellee's counsel informed us that no injury to the public interest is to be anticipated from postponing appellant's arrest. There is no suggestion that he will flee or hide. Counsel suggest a desire to question him but do not show that he cannot be questioned without being arrested. The record shows no reason for the order of arrest, apart from the uncontradicted statements in the complaint that the original defendant, the former Attorney General, "received many letters, telegrams and other communications urging plaintiff's deportation" and his "attention was directed to newspaper columns urging plaintiff's deportation." Neither appellant's criminal record nor his unpopularity justifies imprisoning him. As far as the record shows, his arrest under §242(a) would be a clear abuse of discretion. We have shown that §242(c) does not authorize his arrest while judicial review of the deportation order is pending.

As we held on the former appeal, the question of detention must be decided in accordance with the principles applicable in habeas corpus proceedings. In accordance with those principles, the question of detention is entirely independent of the question who is likely finally to prevail in regard to the validity of the deportation order. If the order be upheld, that will not retroactively legalize a previous arrest. There is no occasion to balance equities. Even if there were, the record contains nothing that could outweigh the irreparable loss of personal liberty which would follow from an arrest.

In denying a preliminary injunction the District Court declared that the crime for which appellant had served a term involved moral turpitude. But this is only one of the issues raised by

the complaint, on which the validity of the deportation order will depend. To avoid piecemeal appeals, we shall not consider this issue until the others have been heard. The case is accordingly remanded to the District Court for further proceedings, with directions to issue a preliminary injunction restraining appellee from revoking appellant's bail and from taking him into custody on a warrant of arrest for deportation, pending final determination of this suit, unless the appellee shows to the court that there are adequate reasons for making the arrest.

Reversed and remanded.

PROCTOR, Circuit Judge, *dissenting*: The majority opinion holds that upon the present record the Attorney General has no authority to arrest Rubinstein while judicial review is pending and that an arrest would be a clear abuse of discretion. They conclude that the "question of detention must be decided in accordance with the principles applicable in habeas corpus proceedings." They remand the case for further proceedings, with directions to issue a preliminary injunction against the arrest of Rubinstein unless adequate reasons are shown.

It seems to me confusing, if not misleading, to involve the question of a preliminary injunction with the principles of habeas corpus. The District Court's authority to grant the injunction rests upon its general powers to preserve pendente lite its jurisdiction over the case or prevent irreparable injury. If I thought the present situation required a preliminary injunction I would put its issuance upon those grounds. However, I am convinced that there is no present need for such action. Therefore, in my opinion, the injunction directed by the majority is an unwarranted encroachment upon and interference with the authority and responsibility of the Attorney General. The practical effect of the injunction is to strip the Attorney General, during the period of judicial review, of his statutory authority to control and supervise an alien[1] who has been ordered deported, although, obviously, control and supervision are more essential after the order than before. As Judge Fahy points out in dissenting from the temporary restraining order of January 26, 1953 (J. A. 57), under section 242 (c) the Attorney General is authorized, when proceedings have progressed to a final order of deportation, to detain the alien, release him on bond in an amount and containing such conditions as the Attorney General may prescribe or release him on such other conditions as the Attorney General may prescribe; also

[1] Immigration and Nationality Act, 66 STAT. 208 § 242 (a) and (c), 8 U. S. C. A. § 1252 (a) and (c) (Supp. 1952).

the warrant under which the Attorney General now allegedly seeks to apprehend and detain Rubinstein does not exhaust that official's discretion under the statute.[2] It is significant too that although sections 242 (a) and 242 (c) seem to recognize that an order of deportation may be judicially reviewed, there is nothing to suggest any power in the court to interfere with the Attorney General's authority to supervise and control during the period of court review. This, I think, clearly implies that the power remains with the Attorney General. Doubtless, arbitrary arrest or detention by him could be challenged by habeas corpus, a speedy and simple remedy quite in contrast to the time-consuming procedure here, but so far there is no detention. Nor do I think the many allegations in the unsworn complaint and in the attorney's supporting affidavit, abounding in hearsay, inference and conjecture, justify any reasonable apprehension of arbitrary or abusive action.

As I view the matter, the critical question now is whether pending a final determination of the case a sufficient showing has been made to warrant an injunction against Rubinstein being taken into custody or detained by the Attorney General. I think not. Although it is charged that the deportation proceedings are lacking in due process and the deportation order is invalid, there is no substantial support for that position, unless it be that the crime of which Rubinstein was convicted did not involve moral turpitude. If it did, then under the applicable statute[3] it became the duty of the Attorney General, upon his warrant, to take Rubinstein into custody and deport him. Admittedly the deportation order is grounded upon Rubinstein's conviction, April 23, 1947, on five counts of an indictment for knowingly making false statements, and conspiring so to do, to avoid the draft, in violation of Selective Training and Service Act of 1940, § 11, 54 *Stat.* 894, 50 U. S. C. App. § 311 (1946 ed.), for which he served concurrent sentences of two years and six months' imprisonment. See *United States* v. *Rubinstein*, 166 F. 2d 249 (2d Cir.), *cert. denied*, 333 U. S. 868, 92 L. Ed. 1146 (1948). I do not doubt that these crimes involve moral turpitude. In essence they do not differ from the crime of perjury and subornation of perjury, which clearly do involve that element. *United States* v. *Schlotfeldt*, 109 F. 2d 106 (7th Cir. 1940); *United States* v. *Uhl*, 70 F. 2d 792 (2d Cir.), *cert. denied*, 293 U. S. 573, 79 L. Ed 671 (1934); *Masaichi Ono* v. *Carr*, 56 F. 2d 772 (9th Cir. 1932). Regardless of all else, the deportation order is supported by the indisputable

[2] This, I think, is true whether section 242 (a) or 242 (c) is read as controlling upon the Attorney General during the period of judicial review.

[3] Act of Feb. 5, 1917 § 19, 39 STAT. 889, 8 U. S. C. § 155 (a) (1946 ed.).

facts of the criminal conviction and imprisonment, established in the deportation proceedings, and the necessary legal conclusion, as I believe, that the crimes did involve moral turpitude. I therefore do not think any substantial question is presented to raise a reasonable belief that the plaintiff will prevail upon a final hearing. Accordingly a preliminary injunction or stay of any kind should be denied. *Hall Signal Co.* v. *General Ry. Signal Co.*, 153 Fed. 907 (2d Cir. 1907); *Zugsmith* v. *Davis*, 108 F. Supp. 913 (S. D. N. Y. 1952); *United States* v. *Libby, McNeill & Libby*, 98 F. Supp. 601 (D. Alaska 1951); *Atlantic & Gulf/West Coast* v. *United States*, 90 F. Supp. 554 (S. D. N. Y. 1950). See also *Pub. Serv. Comm'n* v. *Wis. Tel. Co.*, 289 U. S. 67, 70, 77 L. Ed. 1036, 1038 (1933); *Mass. State Grange* v. *Benton*, 272 U. S. 525, 71 L. Ed. 387 (1926); *Perry* v. *Perry*, 88 U. S. App. D. C. 337, 190 F. 2d 601 (1951); *Wing* v. *Arnall*, 198 F. 2d 571 (Em. App. 1952).

Finally, I suggest that it cannot be supposed the Attorney General will go forward with deportation pending final determination of judicial review. It is fair to assume that the present action of that officer is designed to reconsider and adjust the terms of Rubinstein's release in view of the deportation order. This assumption comports with assurance to the court by the Attorney General's counsel "that he has not at this point in the administrative proceedings determined whether the alien shall be detained, released on bond or released otherwise."

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

APRIL TERM, 1953.

No. 11,683

SERGE RUBINSTEIN, *Appellant*,

v.

HERBERT BROWNELL, Attorney General of the United States, *Appellee*.

United States Court of Appeals for the District of Columbia Circuit.

Filed June 11, 1953, Joseph W. Stewart, Clerk.

APPEAL FROM the United States District Court for the District of Columbia.

Before: Edgerton, Proctor and Bazelon, Circuit Judges.

LEED THROUGH POOR COPY

Judgment

THIS CAUSE came on to be heard on the original record from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court for further proceedings and with directions to issue a preliminary injunction restraining appellee from revoking appellant's bail and from taking him into custody on a warrant of arrest for deportation, pending final determination of this suit, unless the appellee shows to the court that there are adequate reasons for making the arrest.

Per Circuit Judge Edgerton

Dated: June 11, 1953

Separate dissenting opinion by Circuit Judge Proctor.

United States Court of Appeals for the District of Columbia Circuit.

Filed Aug. 6, 1953, Joseph W. Stewart, Clerk.

No. 11,683

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SERGE RUBINSTEIN, *Appellant*,

v.

HERBERT BROWNELL, JR., The Attorney General of the United States, *Appellee*.

Designation of Record

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint Appendix.
2. Opinion.
3. Judgment.
4. This designation.
5. Clerk's certificate.

/s/ Robert L. Stern
ROBERT L. STERN
Acting Solicitor General
Attorney for Appellee

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing designation of record has been mailed to Messrs. Jack Wasserman and Edward J. Ennis, Warner Building, Washington 4, D. C., Attorneys for Appellant.

/s/ Robert L. Stern
ROBERT L. STERN
Acting Solicitor General
Attorney for Appellee

August 6, 1953

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

I, JOSEPH W. STEWART, Clerk of the United States Court of Appeals for the District of Columbia Circuit, hereby certify that the foregoing pages, numbered 1 to 37, both inclusive constitute a true copy of the joint appendix to the briefs of the parties and of the record and proceedings in the said Court of Appeals, as designated by counsel for appellee, in the case of:

No. 11,683

SERGE RUBINSTEIN, *Appellant,*

v.

HERBERT BROWNELL, Attorney General of the United States, *Appellee.*

No. 11,683 . . . APRIL TERM, 1953, as the same remain upon the files and records of said Court of Appeals.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this eleventh day of August, A. D. 1953.

SEAL

JOSEPH W. STEWART,
Clerk of the United States Court of Appeals for the District of Columbia Circuit.

By WILLIAM G. SECREST
Deputy Clerk.

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33 Supreme Court of the United States

No. 300, October Term, 1953

HERBERT BROWNELL, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

SERGE RUBINSTEIN

Order allowing certiorari

Filed November 9, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1953